No. 82-1096

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CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1982

Zinger Construction Company, Inc.,

Petitioner-Plaintiff,

v.

The United States,

Respondent-Defendant.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FORMER U.S. COURT OF CLAIMS
(Docket No. 122-82C)

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QUESTIONS PRESENTED FOR REVIEW

1. Is the the former U.S. Court of Claims' judgment dismissing Petitioner's ("Zinger") suit grounded on 28 U.S.C. Sec. 2501 or laches?

2. If Question 1 is answered "laches," did former Court of Claims' Rule 178, "Motion For Summary Affirmance or to Dismiss the Appeal," which stated categories in which dismissals can be granted prior to Answer, include laches?

3. Was Zinger's failure to invoice for $100 of the amount due it suffictent notification to Respondent ("Government") that a claim was being asserted against it in response to which its Contracting Officer should have issued an adequate decision under the the then Disputes' clause of the contract in question?

4. Does the former Court of Claims' treatment of Zinger fit into a context of anti-contractor attitudes of Federal contracting agencies, courts and Congress chilling to contractors in the event that the nation should ever find it imperative to institute defense mobilization?

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REFERENCES TO REPORTS OF OPINIONS DELIVERED IN COURT AND BOARD BELOW

The opinion of the U.S. Court of Claims, *Zinger Construction Company, v. United States,* Ct.Cl. , F.2d , Aug. 27, 1982 (Docket No. 122-82C (A2), on Motion for Rehearing, Ct.Cl. , F.2d , Sept. 30, 1982 (A) and the opinion of the Postal Service Board of Contract Appeals, *Appeal of Zinger Construction Company,* PSBCA No. 448, 79-2 BCA Par. 14,181 (A5), are reproduced in the Appendix, as indicated.

STATEMENT OF GROUNDS OF JURISDICTION OF THIS COURT

The judgment dismissing Zinger's Petition to the former Court of Claims was on Aug. 27, 1982. Denial of Rehearing was on Sept. 30, 1982 (the day the former U.S. Court of Claims went out of existence).

Jurisdiction of this Court to review such judgment is conferred by 28 U.S.C. Sec. 1255(1).

STATUTES, REGULATIONS AND RULES WHICH THE CASE INVOLVES

Title 28, United States Code

Sec. 2501. Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. . . .

Federal Procurement Regulation

41 Code of Federal Regulations Sec. 1-16.101-32
(U.S. Standard Form 32)

2. Changes

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of

the following: (i) Drawings, designs, or specifications, where the supplies are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change, *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed..

Court of Claims Rules

Rule 178. Motion For Summary Affirmance or to Dismiss the Appeal

In lieu of including such grounds in its brief [sic], at any time prior to the filing of such brief, the respondent may move for summary affirmance or to dismiss the appeal (as the case may be) on the grounds (but only on such grounds) of lack of jurisdiction of the subject matter or person; the bar of the statute of limitations; failure to exhaust administrative remedies; res judicata; or payment, accord and satisfaction, or release, subsequent to the administrative decision; but such motion shall not suspend or delay the proceedings. However, the respondent may accompany such motion by a motion to suspend or delay the proceedings. A motion for summary affirmance or to dismiss an appeal shall be treated as a dispositive motion.

STATEMENT OF THE CASE

Jurisdiction of the former Court of Claims was conferred by 28 U.S.C. Sec. 1491 and by 41 U.S.C. Secs. 321 and 322.

Contract No. 6-1-02512 was awarded to Zinger by the former U.S. Post Office Department on June 30, 1966, and required prefabrication of Self Service Postal Units ("SSPUs") and their erection in seven locations of Philadelphia Region X of the Post Office at a total cost of $66,500. 79-2 BCA pp69,780, 69,781. On the same day, Contract No. 6-1-02513 was awarded to Zinger to so provide SSPUs in 15 locations of Washington, D.C., Region XIV at a total contract price of $77,600. *Ibid.*

One geographic location of Contract 2512 was changed and seven geographic locations of Contract 2513 were changed at the direction of the Government. *Ibid.*

An original Orange, N.J., location became Camillus, N.Y., and six of the Washington, D.C., locations were changed to locations in Alabama, Florida, Michigan and Falls Church, Va. *Ibid.*

Payments associated with the delays were made to Zinger, but delay costs were not paid. See 79-2 BCA p69-784 par. 36. By letter to the Contracting Officer of May 29, 1967, Zinger stated that it had a claim for delays and damages under both contracts 2512 and 2513. *Ibid.* In reply to said letter, the Contracting Officer on June 1, 1967, said that the claim could only apply to contract 2512. 79-2 BCA p69,784 par. 37. On Sept. 13, 1967, the Contracting Officer treated Zinger's May 29, 1967 letter, an earlier letter from it, three subsequent letters and a Sept. 13. 1967 telephone call and took the position that all costs involved in the delay and relocation of the SSPUs had been included in contract amendments ments. 79-2 BCA p69,785 pa.. 43.

Zinger never submitted a voucher for final payment under Contract 2512; final payment under contract 2513 in August 1967, at a time when Zinger had outstanding a claim for delay costs. 79-2 BCA p69,785 par. 46; see 79-2 BCA p69,785 par. 43.

Zinger submitted a claim on July 25, 1977 under the Changes clause for delay related costs. 79-2 BCA p69,786 par. 49. Relying on the Sept. 13, 1967, letter, the now Postal Service denied Zinger's claim on Nov. 7, 1977. *Ibid*, par. 50. A series of letters were exchanged with the Postal Service on Nov. 10, 1977, alleging that the Sept. 13, 1967, letter had been a final decision under the Disputes clause (although it lacked language required by regulation to be included in all final decisions under the Disputes clause) and Zinger treating a refusal to issue another letter as appealable under the Disputes clause. *Ibid*, pars. 50, 51. The notice of appeal was dated Dec. 10, 1977.

The appeal was heard in New York City on Jan. 18, 1979 during which Zinger's President, Mr. Zinger, and a a Postal Service Inspector and Auditor, Harold Schneiderman, testified, as did Mr. Cahill and Mr Letts of the Postal Service. Trial Transcript, consisting of 171 pages. See All

The Board's opinion adopts an audit report prepared by Mr. Schneiderman, which criticized Zinger for not retaining cancelled checks, payroll tax formsand cancelled checks for the years 1966. 79-2 BCA p69,786 par. 55. Zinger's books of account, reflecting the checks number by number and which were kept in the regular course of business, were examined by by Mr. Schneiderman, ~~who did not question their authenticity at trial.~~ A

Zinger's claim was predicated on a "jury verdict" presentation. 79-2 BCA p69,787 par. 59. The PSBCA's rejection of Zinger's claim was predicated on Mr. Scheiderman's testimony and report. 79-2 BCA p69,788 par. 64. The presiding administrative judge had blocked Zinger from showing that Mr. Schneiderman's testimony and report were the product of his prejudice against the "jury verdict" approach, even though it is regularly used by Boards of Contract Appeals. A17. Also, Mr. Schneiderman testified that he could support allowance of a claim using Mr. Zinger's books of account and Small Business 1120-S Tax Returns. A17-18. The 1120-S Forms are referred to in his audit report. A19-20.

Zinger petitioned the former U.S. Court of Claims for review under the Wunderlich Act, 41 U.S.C. Secs. 321 and 322 and was met by a motion to dismiss predicated on 28 U.S.C. Sec. 2501. Said motion was granted. A2.

REASONS FOR GRANTING WRIT

The Court of Claims Opinion, A2, states Zinger's reliance on Nager Electric Co. v. United States, 177 Ct. Cl. 234, 368 F.2d 846 (1966) for the proposition that 28 U.S.C. Sec. 2501's six-year statute of limitations does not begin to run until the Board of Contract Appeals has rendered its decision. (A3).

The opinion states that Nager was predicated on the fact that a contractor had to exhaust its administrative remedy before it could seek judicial review and then goes on to say that the ratonale has little application where a contractor does not pursue its remedy its remedy. (A3)

The other side of the coin is an expectation by the Court of Claims of frantic activity by contractors before BCAs such that missing a 30-day from docketing period for filing of a Complaint pleading or serving answers to interrogatories in fear that 28 U.S.C. Sec. 2501 is otherwise going to start to run. Maybe the term "exhaustion of administrative remedies" will become "zooming through administrative remedies" or a matching of government delays with contractor delays so that the contractor delays can never be found to have exceeded the government delays.

The Court of Claims quotes, at A3, a "warning" from Nager but did not seem to appreciate the following language of its quotation:

> Neither this court nor the administrative panels have had any great difficulty in handling belated claims by contractors under the various-contract adjustment articles.

The Court seems not to have been aware that under the "Changes" clause, 3 supra,

> the Contracting Officer, if he decides that the facts justify such action [consideration after 30 days from the date of receipt by the Contractor of the notification of change] may receive and act upon such claim asserted at any time prior to final payment under this contract.

Under Contract 2512, there was no final payment, A11 par. 49, and under both Contracts 2512 and 2513, claims

were at least made before final payment.

The other members of the Court of Claims panel may have taken comfort that Judge Davis, the author of Nager, by concurring showed agreement by him that in 1966 he had prophesized the result in the 1982 Zinger case. Rather, Zinger submits, the 1966 Judge Davis was saying that the con contract-adjustment clauses were handling the problem. Dawnic Steamship Corp. v. United States, 90 Ct. Cl. 537 (1940), referred to in the quotation involved a 1918 World War I contract—which did not include a pre-1978 Disputes clause at a time when Contracting Officers did not yet exist—that had changed management by March 4, 1940.

The best that can be said for the Nager warning is that the Court of Claims would step in and apply laches.

More importantly, the Court of Claims seems to have been unaware that the Boards of Contract Appeals do not regard themselves as bound by an Statutes of Limitations. Their former 30-day appeal periods tended to keep them away from 2,190-day (365 x 6) Statutes of Limitations.

Furthermore, it was not until 1966 that the government in contract cases was brought under any Statute of Limitations. 28 U.S.C. Sec. 2415. To this day, Boards of Contract Appeals do not apply 28 U.S.C. Sec. 2415 to decisions of Contracting Officers under the Disputes clause asserting claims in behalf of the government.

> The language in the legislative history of the statute and the holding of the Supreme Court quoted above [*Crown Coat Front v. United States*, 386 U.S. 503 (1967)] lead us to conclude that the statute of limitations set out in Section 2415 is a limitation with respect to proceedings not before this Board.
>
> *Appeal of Wide World Tankers*, ASBCA No. 20903, 77-1 BCA Par. 12302 at p59,265. 1/

1. Board of Contract Appeals Decisions is a series of Advance Shhets and Bound Volumes going back to the last half of 1956 and published by Commerce Clearing House.

The principal reason 28 U.S.C. Sec. 2415 was not imposed posed upon the government at the level of the BCAs was that statutes of limitations are not imposed upon contractors at the level of the BCAs.

> The defense that the nine new claims belatedly presented three years after substantial performance and appealed more than six years after the incurrence of the costs they seek to recover, are time barred by the six year Statute of Limitations, is not well grounded. That Statute(28 USCA 2501) relates solely to petitions filed [in] the United States Court of Claims, and does not begin to run until the disputes procedures afforded by the contract are exhausted. [citing *Crown Coat* and *Nager*]. There are no statutory limitations to the filing of claims and appeals for administrative adjudication by contracting officers and appellate boards.
>
> *Appeal of Frances Van Wagner,*
> ASBCA No. 11880, 67-2 BCA
> Par. 6686, at p31,021

> Looking to the statute [28 U.S.C. 2501] it is clear that it applies only to court actions against the Government and not to administrative determinations of claims. There exists as to the latter no statute of limitations and the application to their prosecution of the doctrine of laches is at best limited. [citing *Crown Coat* and *Nager*] In fine, as to the application, the U.S. Supreme Court held in *Crown Coat, supra,* that in contemplation of the statute, the right to bring a civil action accrued only when a Contract Appeals Board has finally ruled on a claim, where an appeal to such Board lies and is taken.
>
> *Appeal of Philco-Ford, Inc.*
> ASBCA No. 14251, 70-2 BCA
> Par. 8499, at p39,514.

Both Van Wagner and Philco-Ford are quoted in World Wide at 77-1 BCA p59,264.

Accordingly, the Court of Claims, in the subject Zinger case held that a port for exercise of its insistence on exhaustion of administrative remedies, the BCAs, is powerless to ignore Statutes of Limitations, which do not expressly embrace them.

41 U.S.C. Secs. 321 and 322 state that the decision of a Board of Contract Appeals is not final, if any of limited criteria are found by a court of competent jurisdiction not to exist..

In this posture, Zinger submits that the period of limitations applicable to it was six years from the date of the decision of the Postal Service Board of Contract Appeals.

The Court of Claims Judgment Was Based on Laches

The immediately preceding discussion leaves the Court of Claims with only a second ground of laches.

It found that the government and itself could not address the case properly because of the destruction of relevant documents. A 4. Mr. Schneiderman's testimony was not that the lack of the documents made impossible determination of an equitable adjustment. A17-18, see A18-19.

The Court of Claims did not dispose of the case on the merits. Mr. Zinger has advised his attorney that not only were Check Numbers reflected in his Cash Disbursements ledger but that he had the check stubs and the same were shown to Mr. Schneiderman. Futhermore, the PSBCA blocked Zinger from questioning Mr. Schneiderman–whose position, in toto, was adopted by the PSBCA–as to prejudice by him against use of the "jury verdict" method regularly used by BCAs. A16-17.

The prejudice was so bad that the Government was unable to call a witness, Mr. Cahill, who attended the preaward survey of Mr. Zinger and recalled it or that the government had lost documents. Tr. 120, 170.

These matters rebut the Court of Claims' statement that it and the government cannot address the case, A4, and suggest that the Court was really trying to avoid considering Mr. Schneiderman's possibility of bias against a method of computing equitable adjustments.

Laches Was Not Embraced In The Rule of the Former Court of Claims, Rule 178 "Motion . . . to Dismiss The Appeal, " Under Which Zinger's Case Was Dismissed

Rule 178 of the former Court of Claims, 2 supra, does not include laches as a stated ground. Was the former Court of Claims saying that laches and and an express statute of limitations are the same? Its rule said "but only on such grounds." Zinger submits that a defense of laches both requires and allows an extended factual inquiry far beyond the type of inquiry into facts usually encountered when a statute of limitations is in question.

Failure to Invoice for the Full Amount of Contract is Notice to the Government That a Claim Is Either Pending or in Contemplation, in Response to Which the Government Can Invoke the Disputes Clause

Possibly the former Court of Claims believed that only a contractor can elicit issuance of a decision under the Disputes clause, possibly because when it comes to appeals only the contractor invokes the right of appeal. Failure of appeal is concurrence with the Contracting Officer on a proposition.

There may be a greater duty on a contractor to invoke the Disputes clause in relation to a claim but the difference is one of degree and, Zinger submits, such difference is not sufficient to overturn the point of view of the BCAs, as opposed as it is to the Court of Claims holding in the subject Zinger case.

The Decision of the Former Court of Claims Fits into a Context of Anti-Contractor Attitudes of Federal Contracting Agencies, Courts and Congress Chilling to Contractors Possibly in the Event That the Nation Should ever Find It Necessary to Institute Defense Mobilization

The fact that the subject Zinger case was an attempted appeal from the Postal Service BCA does not mean that it could not have any affect on relationships of contractors with the Defense Department. The case involves law applic-

able to all Federal contracts. Courts are receiving cases involving all Federal agencies.

In Appeal of Gramercy Corporation, ASBCA No. 17830, 77-2 BCA Par. 12,589, the ASECA expressed annoyance at being asked to readopt a policy of the Second World War that contracts were not to be terminated for default for technical defaults, which the government would have ignored if the requirement for product under a contract no longer existed. 77-2 BCA p61,013. Such policy was adopted to encourage contractors to participate in the then war effort.

In the adoption of the Contract Disputes Act of 1978, 41 U.S.C. Sec. 601, et seq., at the behest of Admiral Rickover, Congress went out of its way to include a "Fraudulent Claims" section, 41 U.S.C. Sec. 604, whose subject matter was amply covered under existing Title 18 sections.

At a regional seminar of the American Bar Association in New York in December, 1966, Keuffel stated that head of CIT had become so angered by treatment of the Assignment of Claims Act of 1940 as it related to an assignment to his company that he said, "If they have another war, let them find someone else to finance it." In the early 1970s, the former Court of Claims countenanced government employees allowing a contractor to withdraw invoices submitted by an assignee, after receiving them from the contractor, to the financial harm of the assignee.

Zinger recognizes that this Court cannot seriously entertain every, even deserving, matter, that comes before it. If the matter involved private individuals, there would be no real hope for this case to receive serious consideration. It is not the fact that the Court of Claims decided a case against Zinger, it is the fact of how it was decided. The opinion of the Court of Claims is emotional (as are parts of this Petition) but a Court should want to follow, most of all, the rules it has adopted for itself. The Court of Claims cut corners confident that Zinger would never petition this Court and even more confident that if he did, this Court would deny Certiorari

The Court did not realize that its action was communicating an attitude of hostility to contractors and an unwillingness to delve deeply into their cases, unless some atrocity needs correction. If the Federal government wants contractors to do business with it, it must recognize that it will have to provide a credible forum for hearing, not merely listening to disputes.

Possibly, Zinger does not have equity, or at least eager, equity on its side—but the foregoing has shown that the law is on Zinger's side. A completely favorable factual setting is the rarity that does not allow the Court reach a wide enough audience for its opinion to affect enough of the nation.

A decision on the law of this case is important to the Federal contracts community—the BCAs and the former Court of Claims being in rebellion against each other—but even more important would such an opinion be to the right attitudes within that community. It has been said that the Fourth Branch of Government is not the Press but is the reliance that is placed on contractors.

The fear is that contractors might hesitate in the event of defense mobilization—and ask for fairer contract terms—and that such hesitation could cause a loss of a quick war.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD ISSUE AND THE COURT SHOULD ACCEPT THE CASE FOR ARGUMENT OR SHOULD SUMMARILY REVERSE THE FORMER COURT OF CLAIMS

Dated: New York, N.Y.
December 28, 1982

Respectfully submitted,

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CONCERNING JUDGMENT

A telephone call to the office of the Clerk of the new U.S. Court of Appeals for the Federal Circuit, whose personel staffed the office of the former U.S. Court of Claims and whose physical location was the same, yesterday brought the response that practice in the former Court of Claims did not include a formal judgment, an Order and Opinion (e.g., A2), serving the purpose in other courts of a judgment.

CORRECTED APPENDIX
(Pages A17-A18)

IN THE UNITED STATES COURT OF CLAIMS

No. 122-82C

ZINGER CONSTRUCTION COMPANY, INC.	)	
v.	)	
THE UNITED STATES	)	Aug. 27, 1982

James V. Joy, Jr., attorney of record, for plaintiff.

Lynn Bush Ferguson, with whom was *Assistant Attorney General J. Paul McGrath*, for Defendant. *Thomas W. Petersen* and *Don Ana*, U.S. Postal Service, of counsel.

Before DAVIS, BENNETT, and SMITH, *Judges*.

ORDER

This contracts case is before us on defendant's motion to dismiss the claim as barred by our 6-year statute of limitations. 28 U.S.C. Sec. 2501 (1976). We grant defendant's motion.

The procedural history as found by the Postal Service Board of Contract Appeals (board), 79-2 BCA Par. 14,181 (PSBCA No. 448), and not disputed by plaintiff is as follows. The relevant contracts were entered into in 1966. Numerous delays by the Post Office Department ensued and 1967 was filled with negotiations between plaintiff and the contracting officer (CO) over added costs. On september 13, 1967, the CO wrote plaintiff that the results of the negotiations were his final position and that he considered the matter concluded. He, did not, however, include in his letter language recitting plaintiff's appeal rights. Regulations in force at that

time required that a final decision contain such language.

Plaintiff submitted a related claim in January 1968, but it was never followed by the required documentation. The last action taken by plaintiff in this period was a letter to the Postmaster General on January 6, 1969, requesting information on the procedure for filing a breach of contract claim. The letter was referred to the CO who asked plaintiff for details. The CO received no response.

Plaintiff was next heard from on July 25, 1977—8 years after its last communication and nearly 10 years after the completion of contract work—when it wrote to the CO with a claim for recovery over and above the amounts negotiated and which the CO had stated were his final position in September 1967. The CO responded on November 30, 1977, that the September 1967 letter had been his final decision; nevertheless, plaintiff treated the November 30, 1977, letter as the final decision and appealed to the board on the basis of it. After a full hearing, hampered by plaintiff's destruction in the intervening years of certain records, the board denied plaintiff's claims on the merits in a decision of December 3, 1979. 79-2 BCA Par. 14,181. Plaintiff appeals to this court under the Wunderlich Act. 41 U.S.C. Secs. 321-322 (1976) [sic].

Plaintiff relies on our holding in *Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 368 F.2d 847 (1966), that limitations period in Wunderlich Act cases does not begin to run until the board has rendered its decision. The rationale of *Nager Electric* is that a plaintiff has no cause of action prior to a final decision because, even if it wanted to, it could not get into court at that point. *Id.*, 177 Ct. Cl. at 251-52, 368 F.2d at 858-59. This rationale has little application where a plaintiff makes no effort to pursue his claims, in court or otherwise.

Furthermore, the court in *Nager Electric* expressly warned, *id.*, 177 Ct. Cl. at 259-60, 368 F.2d at 864:

> Similarly the contractor in the cases before us (and the mass of such cases) is not left at large to present his claim administratively whenever he likes. The Disputes clause does not itself fix a time within which a disputed issue of fact must be presented to the contracting officer * * *. * * * where no specific

> period is established in the contract the contractor cannot delay unreasonably. *Cf., Dawnic Steamship Corp. v. United States*, 90 Ct. Cl. 537, 579 (1940). Neither this court nor the administrative panels have had any great difficulty in handling belated claims by contractors under the various contract-adjustment articles. Contractors have not been able to extend the limitations period unduly by unilaterally postponing the commencement of the administrative process. [Footnotes omitted.]

If ever there was a case where this warning should be imposed, this is it.

Even if the September 13, 1967, letter did not bear all of the technical aspects of a final decision, plaintiff certainly treated as such—until it suited plaintiff otherwise, 10 years later. Plaintiff's reason for not pursuing its claims was not the lack of finality of the decision at all, but choice. Plaintiff's dent as much as admitted this. Quoting the board, 79-2 BCA Par. 14,181 at 69,786:

> In testimony Zinger stated as his reason for the ten year delay in filing the claim that he took things "in order of pressing needs. If I have things with a larger dollar and more complicated items, I will devote my time to things tha, are more complicated, in so doing time has passed." Later in testimony he said "* * * I weighed the situation and I gave things priorities and this didn't happen to have a high priority." [Citations omitted.]

Even counting from the January 6, 1979, letter, plaintiff's delay was 8 years and 7 months; otherwise it was nearly 10 years. These far exceed our 6-year statute of limitations.

Furthermore, this delay is not without elements of prejudice to defendant and the court. We said in Wilmot v. United States, 205 Ct. Cl. 666, 686 (1974), in connection with a defense of laches:

> Prejudice to defendant is manifest from undue delay.
>
> "* * * The defense of laches stems from the principle that 'equity aids the vigilant, and not those who slumber on their rights,' and is designed to promote diligence and prevent enforcement of stale claims. * * *"

Plaintiff has destroyed certain relevant documents, without which neither defendant nor the court can address the case properly. Both the letter and policies of the statute of limitations

are offended in this case, and we must dismiss it.

IT IS THEREFORE ORDERED, after careful considera tion of the parties' submissions and without oral argument, that defendant's motion to dismiss is granted and the petition is dismissed.

BY THE COURT

Edward S. Smith
Edward S. Smith
Judge

AUG 27 1982

IN THE UNITED STATES COURT OF CLAIMS

September 30, 1982

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties as set forth, for rehearing, reconsideration or other relief under Rules 7(d), 151 and 152 are DENIED:

* * * * * * * * * * * *

122-82 Zinger Construction Company, Inc. Plaintiff's motion for rehearing and vacation of judgment filed September 13, 1982, or order dated August 27, 1982. (DAVIS, BENNETT and SMITH, Judges.)

* * * * * * * * * * * *

SEP 30 1982

—Footnote—

[1] *Merritt-Chapman & Scott Corp.*, VACAB-610, 69-1 BCA ¶ 6,994.

[¶ 14,181] **ZINGER CONSTRUCTION COMPANY, INC.**

PSBCA No. 448. December 3, 1979. Contract Nos. 6-1-02512, 6-1-02513.

Payments—Effect of Final Payment by the Government—Suit Years After Settlement—Delay Cost Claims

Execution of contract amendments by a contractor, without reservation of a claim for delay costs, and execution of other amendments, which considered delay costs, released all of the contractor's claims arising out of the amended contracts. The contract was for construction and installation of self-service postal units. The costs claimed were for delays and related costs that arose after the government changed the installation locations of a number of the units. The contractor argued that the amendments covered only the relocation expenses, not the costs resulting from delays in making sites available. The execution of the amendments constituted an accord and satisfaction with respect to those claims not reserving a delay cost claim. As to the other claim, a long and unexplained delay in pursuing the claim, coupled with the destruction by the contractor of pertinent records, barred its consideration. Final payment had been made in 1967 and the claims were brought in 1977.

Payments—Payments by the Government—Discounts Available to the Government—Unearned Discount—Forefeiture

Government forfeiture of a discount on a contract to install self-service postal stations was not proved by unsubstantiated allegations that were asserted after an unreasonably long delay. The so-called "discount" allegedly represented the difference between the extended unit amount for a certain number of units and the lower price bid by the contractor for that work. Ten years after payment, the contractor contended that the discount only applied to those units that would be installed in the exact locations and within the delivery times specified in the solicitation; when the government changed the installation sites and the delivery times, the discount was not applicable. However, the claim for a discount forefeiture was merely a disguised request for an equitable adjustment for changes, which the evidence available after ten years would not support.

James V. Joy, Jr., for the appellant. D.D. Anna for the government.

Opinion by Administrative Judge Grant with Administrative Judges Cohen and Cowden, Jr., concurring.

(Text of Opinion)

This appeal arises under contracts for fabricating and installing Self-Service Postal Units (SSPU's). It includes two claim items: one, for recovery of $2,300, the total amount of a "discount" allegedly allowed by Appellant in its bid on Contract No. 6-1-02512; the other, for $40,554 allegedly constituting costs of standby, loss of efficiency, impact, ripple effects, unabsorbed overhead, etc. due to relocation of seven SSPU's under Contract No. 6-1-02513 and one SSPU under Contract No. 6-1-02512. Appellant also claims interest in the amount of $2,877 on the two claim items, making a total of $80,833.

Both entitlement and quantum are presented for decision.

Findings of Fact

The first 15 numbered fact findings are based on the stipulation of the parties dated January 2, 1979.

1. Invitation for Bids 1357 was issued on May 24, 1966, by Procurement Division, Bureau of Facilities, Post Office Department (hereinafter POD or USPS), and sought bids on Self-Service Postal Units (hereinafter called SSPU's) at various locations in each of its 15 Regions (I-XV).

2. Dated June 20, 1966, the bid opening date, Appellant's bid sought award of the contract to manufacture and install SSPU's at locations in Regions IX, X, and XIV.

3. The Specification for "United States Post Office Self Service Postal Unit" is Specification No. 3450-6063-A May-66, consisting of eight Sections: 1. Scope of Work, 2. Special Requirements, 3. Structural Steel, 4. Core and Roof Assembly, 5. Painting and Finishing, 6. Architectural Metal Work and Plastic Sign Panels, 7. Miscellaneous Equipment Plumbing and Electrical Work, and 8. Erection of Units.

4. Specification Par. 1.1.2 reflects that installation of SSPU's would be "on foundation sites previously constructed by others to receive these units."

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5. Specification Par. 1.2 states that the Post Office Department would furnish: a. Change Making Units, b. Multi-Commodity Vending Units, c. Stamp Vending Units, d. Parcel Post Scales, e. Alarm System, f. Parcel Post Depository and g. End Scale Nitch Sign Panels; for installation in the SSPU by the Contractor.

6. Specification Par. 2.22 gives the Contracting Officer the right to order changes with any dispute as to the amount to be paid therefor to be processed under the "Disputes" clause of the contract.

7. Pursuant to its bid, Appellant was awarded on June 20, 1966, three contracts, only two of which are pertinent to this appeal.

8. Contract 6-1-02512 [hereinafter 2512] covered seven locations in Region X [Philadelphia Region] at a total contract price of $66,500.

9. Of Contract 2512 locations, only location Xa, which originally was Orange, N.J., and became Camillus, N.Y. is pertinent to this appeal.

10. Contract 6-1-02513 [hereinafter 2513] covered eight of 15 locations in Region XIV at a total contract price of $77,800.

11. Of Contract 2513 locations, the following seven locations are pertinent to this appeal:

Original		Changed to
XIVh	Washington, D.C.	Hollywood, Fla.
i	do.	Winter Park, Fla.
j	do.	Birmingham, Ala.
k	do.	Flint, Mich.
m	do.	Jacksonville, Fla.
n	do.	Syracuse, N.Y. II
o	do.	Falls Church, Va.

12. Pursuant to Contract 2512, location Xa [Orange, N.J.—Camillus, N.Y.] was scheduled to be completed Oct. 21, 1966 but was not completed until Nov. 2, 1967.

13. Pursuant to Contract 2513, the following locations were to be completed on the scheduled dates shown below but were not completed until the completion dates shown:

	Scheduled	Completed
XIVh	Jan. 20, 1967	Apr. 10, 1967
i	Jan. 20, 1967	Apr. 5, 1967
j	Jan. 20, 1967	Mar. 28, 1967
k	Jan. 20, 1967	Apr. 22, 1967
m	Jan. 2, 1967	Apr. 10, 1967
n	Jan. 27, 1967	May 5, 1967
o	Jan. 27, 1967	May 10, 1967.

14. The changes of locations referred to in Findings of Fact 9, 11-13, *supra*, were at the instance of the Respondent and not at the instance of Appellant.

15. The Solicitation for Bids (at p. 7 of 18 pages) advised bidders that in case of change in destination subsequent to contract award, the contract price would be equitably adjusted for any increased or decreased costs to the contractor and that the Changes article of the General Provisions (Supply Contract, Standard Form 32, June 1964 Edition) would apply to any change in destinations. That clause provides in pertinent part as follows:

"2. CHANGES

"The Contracting Officer may at any time by written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: . . . (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however*, That the

Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. . . . Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed."

16. The only provision of the contract expressly providing relief for delay is paragraph 2.3 of section 2 of the Special Requirements of the specifications which provides for time extensions to the contractor on account of delays caused by unusual conditions. There is no contract clause expressly providing for a monetary equitable adjustment for delay-related costs or damages.

17. Appellant at the time of award of this contract operated a small construction company, doing mainly government work, 98 percent of it renovation, or rehabilitation, of buildings (Tr. 68, 72). Its president, Irving Zinger, was knowledgeable in the field of government contracts (Tr. 68, 89). Appellant bid on the instant contracts during a slack period in the construction business reflected, according to Zinger, in an advantageous price to the government (Tr. 72). For performance of these contracts, Appellant rented a shed in which to manufacture the self-service units, purchased a nailing machine and "similar tools for production" and an air compressor to take to the various sites to power the nailing machine and to spray paint (Tr. 77, 78). Also Appellant maintained an office consisting of approximately 1800 sq. ft. in a private home, a 1000 sq. ft. garage used for tool storage, a basement used 50 percent for storage of tools and hardware and a yard approximately 120' x 100' used for storage of scaffolding, trucks, sheds, and trailers (Tr. 76-78).

18. On November 7, 1966, Zinger wrote the Contracting Officer (hereinafter called the CO) with advice that the eight units for the Washington, D.C. area were partially fabricated and asking for information as to the exact location and tentative delivery date for each unit so that Zinger could schedule its work (A.F. 10). As found above these units were originally scheduled for delivery by January 20, 1967.

19. At the time of the November 7 inquiry POD was having difficulty making final decisions as to ultimate unit locations and making arrangements with sleeping centers around the country for installation of the units (A.F. 11, 13).

20. On or about December 5, 1966 POD advised Zinger that seven of the units originally to be located in the Washington, D.C. area would instead be located in Colorado Springs, Co., Hollywood, Fla., Huntsville, Ala., Flint, Mich., Chicago, Ill., St. Joe, Missouri, and Wichita, Kansas (A.F. 18).

21. Thereafter, Zinger, under date of December 12, submitted a cost breakdown for installing the units in the new location. The breakdown proposed additional costs per unit ranging from $2,858 to $4,688. It included seven additional cost items per unit including additional overhead and increased labor costs due to 70 percent efficiency (A.F. 16).

22. In a letter to the CO dated December 20, 1966 (A.F. 19) Zinger explained that the original base price for the Washington area units was low because it was assumed that all eight units would be installed in a relatively small area in a four-week period, thus providing savings in overhead, trucking, supervision and efficiency which were passed on to POD. Zinger claimed that POD's later decision to scatter the units around the country resulted in inefficient scheduling requiring a 20 percent increase in price.

23. On January 13, 1967 (A.F. 20) Zinger advised the CO that failure of POD to proceed with ordering delivery of seven units originally to be located in the Washington area and one unit in the Philadelphia area in place of the East Orange, New Jersey unit, was costing additional amounts over and above the contract requirements for which Zinger was making claim under the "Delays and Damages Clause" of the contracts. (As noted above, the contracts did not contain such a clause).

24. On January 18 (A.F. 30) Zinger quoted a new total cost of $10,487.50 for each Washington area unit.

25. On January 18 the CO advised the administrative contracting officer (ACO), Thomas A. Cahill, who was negotiating the proposed changes with Zinger, to secure from Zinger sufficient pricing detail, such detail to be recorded in the event of later controversy (A.F. 30).

26. On February 2, 1967 the ACO negotiated with Zinger, and recommended to the CO, price increases of $2,200 each for relocation of four of the Washington units

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to Hollywood, Fla., Winter Park, Fla., Birmingham, Ala., and Flint, Mich., plus additional shipping costs, with the understanding that the Alabama and Florida sites would be ready for acceptance at the same time (A.F. 31).

27. The CO determined to accept the prices negotiated on February 2 and to issue a contract amendment in accordance therewith (A.F. 25). A breakdown of the costs included in the $2,200 per unit increase, furnished by the ACO to the CO (A.F. 28), shows increased labor costs resulting from inefficiency and additional administration costs, some of the types of cost included in the claim before us.

28. On March 8, 1967 (A.F. 43) Zinger wrote to the CO with respect to additional costs attributable to POD delays in ordering delivery of the SSPU's. In this letter Zinger stated that its bid price for the SSPU's was based on the locations and delivery dates specified in the bidding documents and that due to delays caused by Respondent's failure to order installation by the dates originally specified, called by Zinger a "breach of contract", Appellant was incurring, and asking reimbursement for, additional expenses projected through June 30, 1967 as follows:

	3/1	4/1	4/15	5/1	5/15	6/1	6/15	7/1
1. Cost of money	485	485	242	242	242	242		
2. Shop Rent	200	200		200		200		
3. Yard Rent	100	100		100		100		
4. Washington	150	150		150				
5. Additional Cost of Administration work	1000	1000	750	750	1000	1000		
6. Cost due to loss of experienced personnel		200	200	300	300	300		
7. Cost of office space pro-rated	100	50	50	50	50	50		
8. Cost of loss of equipment use		200	300	300	300	300		
9. Cost to relocate stored material		800						
Total Cost for each period of delay	$2035	3185	1442	2092	1892	2142		

29. On March 10, 1967 (A.F. 33) Appellant signed contract amendment No. 2 allowing a price increase of $8,800 ($2,200 per unit) for relocation of four Washington area units as described in Finding of Fact No. 25, *supra*. Further adjustments were to be allowed for common carrier charges and tolls, if incurred. The modification specifically stated it included direct costs only.

30. On March 31, 1967 the CO replied to Zinger's March 8 letter, expressing regret for delay in locating units, assuring Zinger that every effort was being made to locate remaining units, and stating that payment

for completed units was being expedited. The CO also stated that price adjustments had been agreed on fully compensating Zinger for all additional expense involved in the change in location and completion date of the Hollywood, Winterpark, Flint, and Birmingham units. Zinger was instructed to submit realistic proposals, fully supported, for price adjustment on remaining units to be relocated. The CO stated he could not treat the breakdown on page 3 of Zinger's March 8 letter (*supra*) as a realistic proposal and that Zinger would have to relate and allocate additional costs to each unit (A.F. 43).

31. On April 14, 1967 Zinger wrote a letter (A.F. 48) to the CO providing a breakdown of its proposal of $3,199 additional compensation for installing a unit at Jacksonville. In this letter Zinger stated that additional costs as listed in its letter of March 8 were continuing and requested that prompt payment therefor be made to minimize further costs and delays.

32. On April 20, 1967 (A.F. 48), the ACO wrote the CO recommending acceptance of Zinger's April 14 proposal costs for the Jacksonville unit. The ACO stated that he did not discuss with Zinger the generalities concerning delay claims referred to in the April 14 letter and asked for POD's thinking on such claims.

33. On May 2, 1967, the ACO negotiated with Zinger the sum of $3,034 as the additional cost to be allowed for the Jacksonville unit. Zinger's proposal and the memorandum of negotiation show that certain costs of the type which Appellant claims to be delay-related were considered and included in the negotiated amount (A.F. 48 shop rent, labor inefficiency).

34. Under date of May 4, 1967, POD issued amendment No. 5 to contract 2513 covering a price increase of $3,034.00 for the Jacksonville unit. The amendment stated that it represented "a full and complete equitable settlement for changing the location of one unit from the Washington, D.C. area to Jacksonville, Fla., with completion by April 4, 1967, rather than January 27, 1967 as called for by the contract." There is no indication that Zinger in signing this amendment reserved any future claim for breach or delay costs.

35. Under date of May 16, 1967, POD issued amendment No. 7 to contract 2513 (A.F. 58) allowing Zinger additional costs totalling $3,428.80 as a "full and complete equitable settlement for the changing of location of 2 units from the Washington, DC area to Syracuse, N.Y. and Falls Church, Va. with completion by June 1st, 1967 rather than January 27, 1967 as called for by the contract . . . There is no indication that Zinger in signing the amendment reserved any future claim for breach or delay costs.

36. In a letter to the CO dated May 29, 1967, (A.F. 57) proposing, under a new USPS solicitation, to install at Phoenix, Arizona two unassigned units on hand, Zinger made the following statements:

"We have a claim for delays and damages at the present time under the above referenced contracts [2512 & 2513]. We propose the following:

"1. We will furnish and install these two unassigned Self-Service Postal Units at the two Phoenix, Arizona locations by the delivery date as set forth in IFB 67-14.

"2. We will withdraw all our claims and close out the contracts.

"3. The above listed proposals will be performed for an additional package price of . . . $18,000 . . . over and above the base contract price for the two unassigned units.

. . .

"In order to minimize costs and delays, may we respectfully urge that a decision be forthcoming within the very near future."

37. By letter of June 1, 1967 (A.F. 57) the CO rejected Zinger's May 29 proposal stating that the claim for delays and damages could only apply to the one remaining unassigned unit, previously assigned to Orange, N.J. (contract 2512), because "all of the others have been negotiated to a final settlement."

38. On June 5, 1967 (A.F. 58) Zinger wrote to the CO answering his June 1 letter, *supra*, stating, in pertinent part as follows:

"We are in receipt of the above referenced letter and wish to inform you that as per our letter of March 8, 1967, there still exists claims for damages and delays against the Post Office Department for their breach of the above subject contracts. We have never settled these claims with the Post Office Department. All additional monies paid us to-date were solely for the cost of relocation of the individual Self-Service Postal Units. Additional administration costs, insurance on materials, rent for shop and yard for storage of said Postal Units, loss of use of monies invested in the units and numerous other costs incurred by us above and beyond the scope of the contract still go on. All these added costs have now been incurred for over four (4) additional months due to the Government's breach of the above

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subject contract by its failure to deliver sites for, or accept delivery of the Self Service Postal Units.

...

"Our proposal of May 29, 1967 [see Finding of Fact No. 38; supra] was to assist the United States Postal Department to minimize any further costs to them by the continuous failure on their part to live up to not only their Contractual Obligations, but also additional promises made by the Post Office Department as to the actual completion date of said contracts.

"You stated in your letter of June 1, 1967, that all but one unit had been assigned, yet the Syracuse, New York unit which was contracted for by the government several months ago, with a continuous promise of a slab ready for installation as soon as the ground thaws, has not yet, to our knowledge, even been started. We feel this unit location will not be forth coming."

39. On July 19, 1967 Zinger wrote the CO (A.F. 80) complaining that the unit assigned to Orange, N.J. ready for delivery since October 10, 1966, the delivery date specified in the contract, had still not been assigned. The letter reiterated warnings given in Zinger's March 8 and June 5 letters, *supra*, that storage, interest, insurance, and other breach costs relating to that unit were continuing to accumulate and requested an early decision to minimize further costs.

40. On July 26 POD notified Zinger that the Orange, N.J. unit was being assigned to Camillus (Syracuse,) N.Y., the slab to be ready by August 31, 1967 (A.F. 82).

40. On September 9, 1967 Zinger submitted a breakdown (A.F. 84) of proposed additional costs totalling $3,967 for delivery and installation of the Orange, N.J. unit at Camillus, NY. The proposal included a further charge of $2,100 described as "Government's forfeiture of discount on entire contract as set forth in telegram dated June 30, 1966." The letter transmitting the breakdown pointed out that the costs shown did not include costs attributable to breach of contract by POD. The so-called "discount" is one of the items of claim in this appeal. Mr. Zinger testified at the hearing that the $2,100 represented the difference between $68,600, the extended amount for seven units at $9,800 each under Item X of Contract 2512, and the lower price of $66,500 bid by Zinger on that item. Zinger explained that the reduced price was offered on the assumption that Appellant would be awarded a contract for the seven units and that they would be installed in the exact locations and within the delivery times specified in the solicitation. When POD changed locations and delivery times Zinger felt that the reduced price was no longer applicable (Tr. 40, 41).

42. After protracted negotiation Zinger executed Amendment No. 1 to Contract 2512 (A.F. 93) under which it was paid $2,778 described in the amendment as a full and complete equitable settlement of Zinger's September 9 proposal for the Camillus unit except for the claimed forfeiture of discount in the amount of $2,100 "not considered to be included in this settlement."

43. On September 13, 1967 (A.F. 63) the CO responded to Appellant's September 7 telephone call relating to Zinger's March 8, May 29, June 5, and July 19 letters which Zinger said had never been answered. The CO took the position that all costs involved in the delay and relocation of units as listed in Zinger's March 8 letter were considered by POD at the time the amendments were entered into; that the final prices of the amendments represented a compromise of positions and that POD agreed to higher prices to reach settlement than would have been the case had it not been for the claim asserted in Zinger's March 8 letter. The CO's position, essentially, was that the amendments were accords and satisfactions of the breach and delays damages claims.

44. On September 20, 1967 Zinger wrote to POD (A.F. 64) stating that the contracts had been breached once the delivery dates were exceeded without furnishing the contractor slabs on which to erect the SSPU's and that it was filing its claim with the Postmaster General.

45. In January 1968 Zinger submitted to the CO a claim for damages in the amount of $800 due to delays in connection with a SSPU installed at Flint, Michigan (Contract 2513). The record does not contain a response to Zinger on this claim but does reflect the CO's attitude expressed to the ACO (A.F. 66) that no payment would be made unless the claim was fully documented.

46. Appellant never submitted a voucher for final payment under Contract 2512 because it did not want to foreclose pending claims under that contract (Tr. 36). Final payment was made under Contract 2513 in August 1967 (A.F. 69). There is no evidence that any release of claims was required of Appellant or executed by it in connection with such final payment.

47. Zinger took no further action on its breach claims until January 6, 1980 when it wrote to the Postmaster General (A.F. 69) requesting detailed information as to the proper procedure for filing a breach of contract claim, stating that it would file such a claim on receipt of such information.

48. The January 6 letter was referred to the CO for reply. The CO promptly asked Zinger for specific details as to the alleged breach and whether Appellant formally notified POD of such claim prior to submission of final invoices on Contracts 2812 and 2813 (A.F. 70).

49. Zinger was not heard from again on the matter of claims under these contracts until nearly 10 years after completion of the work when on July 25, 1977, it wrote to the CO (A.F. 71) presenting a claim in the amount of $68,000, with no dollar breakdown or supporting documentation. The claim consisted of two items. The principal item was for additional compensation under the Changes clause for delay-related costs. Zinger taking the position that contract price increases had covered only relocation expenses, not costs resulting from delays in making sites available, and, therefore, were not full equitable adjustments for such delays. The second claim item was for recovery of the "discount" of $2,100 allegedly allowed by Zinger in his bid on Contract 2812 described in Finding of Fact No. 41, *supra*. Zinger asserted, also, that final payment had not been made under either contract.

50. On November 7, 1977 Respondent (now USPS) answered Zinger's July 25 claim letter (A.F. 71). Respondent took the position that the CO's letter of September 13, 1967 (A.F. 63; Finding of Fact No. 43, *supra*), constituted an adverse decision on the claim; that Appellant's failure to "reasonably communicate further with respect to this claim has substantially prejudiced the Postal Service; that the claim was barred by laches and by the statute of limitations applicable to POD contracts; that the September 13, 1967 adverse decision was correct in determining that the contract amendments granting price increases for the units involved constituted, together, an accord and satisfaction of the claim; and, finally, that the September 13, 1967, adverse decision was a final decision.

51. On November 10, 1977 (A.F. 74) Zinger replying to Respondent's November 7 letter, *supra*, asked if Respondent was using the September 13, 1967 letter as a "final decision at this time." Respondent replied on November 30 (A.F. 78) stating that the September 13 letter was a final decision; that the November 7 letter was not a final decision and that another final decision would not be issued.

52. Treating Respondent's November 30 letter, *supra*, as a final decision Appellant appealed the decision by notice of appeal dated December 10, 1977.

53. In testimony Irving Zinger said that in executing the pertinent contract amendments he did not intend to waive any claims (Tr. 44-53).

54. In testimony Zinger stated as his reason for the ten year delay in filing the claim that he took things "in order of pressing needs. If I have things with a larger dollar and more complicated items, I will devote my time to things that are more complicated, in so doing time has passed" (Tr. 94). Later in testimony he said "... I weighed the situation and I gave things priorities and this didn't happen to have a high priority" (Tr. 112).

55. In January 1978, *after filing this appeal*, Zinger destroyed payroll tax forms, copies of W-2 forms, and cancelled checks for the years 1966 and 1967 which Respondent's auditor later requested in connection with an audit of Appellant's costs for this claim (Tr. 162, 163; AX. I (Appendix 4)). In a letter to the auditor Zinger said the records were discarded in January, 1978 "as being over 10 years old" (AX. I).

56. Appellant's claim exclusive of the $2,100 "discount" item, consists of the following items (A.F. 71):

1. Increased direct costs
2. Loss of efficiency due to delays
3. Disruption of production
4. Change of sequence
5. Impact and ripple due to delays, changes, and loss of efficiency.
6. Unabsorbed and extended overhead
7. Mobilization and demobilization
8. Interest on capital for inventory
9. Storage costs
10. Standby costs
11. Interest on claims
12. Profit on all costs.

57. Mr. Zinger testified in generalities as to the effects of Respondent's delays in ordering the installation of 36PU's. For example he testified that he had to keep his installation crew on "standby" because of the fast response required to an order for

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installation (Tr. 59, 60); that under this type of contract Appellant received payment only after a unit was installed and accepted (Tr. 60); that Appellant was unable to borrow money because the bank would not lend money on this kind of inventory (SSPU's) (Tr. 61); that Zinger had to use his own money which he could otherwise have used for investments or taking on other contracts (Tr. 61); that the delays affected Appellant's bonding capacity (Tr. 62, 63); that delays resulted in loss of proficiency by crew members with consequence loss of efficiency in the installation work (Tr. 101-104). Appellant has not assigned a dollar amount to each of the items listed in Finding of Fact No. 56.

58. Appellant's attorney prepared for Appellant its quantum claim (AX. 2). According to Mr. Joy's statement at the end of the exhibit, he prepared the claim using Zinger's cash disbursements ledger for 1966 and 1967 (cumulated month by month on AX. 3, an "Analysis of Disbursements" made by Mr. Joy) and corporate income tax returns for the same years, the latter used to obtain depreciation figures. In testimony Zinger adopted Mr. Joy's product (AX. 2) as the basis of the quantum claim for delays and extended overhead (Tr. 100).

59. Mr. Joy's approach, under which Appellant asks for a "jury verdict" of $60,833 as an equitable adjustment under the Changes article, is based essentially on a cash flow-unit months approach.

60. From Appellant's cash disbursement records Mr. Joy extracted and cumulated gross wages for the period September 1, 1966 through June 30, 1967, totalling $48,204.78. Then using a unit months concept, Mr. Joy computed a total of $23,063.50 as increased direct labor costs for the delay in unit installations beyond the original installation dates specified in the contract. If applied, clerical errors in Appellant's records discovered by Respondent's auditor would reduce this figure to $20,433 (AX. 1).

61. To arrive at an amount for "unabsorbed and extended overhead costs" attributable to delays in unit installation, Mr. Joy cumulated total cash disbursements for the period July 1, 1966 through March 1967 arriving at a total of $163,793. From that total he deducted direct labor costs, FICA payroll taxes, materials and supplies and subcontracting costs to arrive at a cost base of $69,777. Again applying a unit months concept, Mr. Joy computed a figure of $58,068 representing unabsorbed and extended overhead costs attributable to government delays. Respondent's auditor discovered discrepancies in general ledger account balances, duplication of wages, and overstatement of depreciation which, if applied, would reduce the base cost for these overheads to $43,440 and $55,506 attributable to delay.

62. There was no testimony on Appellant's behalf that the records used to support its claim were accurately made.

63. In his post-hearing brief Appellant presents a revised claim totalling $60,833.00 broken down as follows:

Item K, 7 Locations Times $9,800 = $68,600 Less $66,500 Award Amount (Tr 37-43)		$ 2,100.00
Standby costs, loss of efficiency, impact, ripple effects, unabsorbed overhead, etc., due to relocations of eight Self Service Postal Units (SSPUs)		45,656.00
Labor (Ex 4, Tr 35)	$16,000.00	
Overhead (& G&A) (Ibid)	25,306.00	
	$41,306.00	
Profit (10%)	4,130.00	
	$45,436.00	
		$47,956.00
Interest (6%)		2,877.00
		$50,833.00

There is an error of $100.00 in the $2,200 figure: $68,600 less $66,500 is $2,100. The labor cost of $16,000 is the figure originally claimed by Appellant. The overhead figure is that arrived at by taking into account the discrepancies discovered by the auditor (Finding of Fact No. 60, supra).

64. Postal Inspector Harold Schneiderman, a qualified auditor of 30 years accounting experience, audited Appellant's records in connection with this claim. According to Mr. Schneiderman subsidiary records and documentation to test transactions recorded in the general ledger were not available. There was no way to substantiate the claimed amount (Tr. 139). There was no way to determine exactly what a cost shown on the ledger was incurred for. There was no way of verifying checks drawn. There were no bank statements. There were only ledger entries, unverifiable and largely unexplained (Tr. 149, 160, 160). Based on the unrebutted testimony of Mr. Schneiderman we find that the cost accounting record used by Appellant in developing final costs was not supported and that the claim submitted has no valid accounting basis.

Based on lack of accounting support for the elements of the claim for delay related costs, the auditor recommended disallowance of the claim (AX-1).

65. The CO, Mr. Intyre, was at the time of the hearing no longer employed by Respondent. Mr. Cahill, the ACO on the contract, testified that he did not know where Mr. Intyre is now located. Cahill also testified that he was present twice during negotiations concerning contract amendments between Zinger and the CO and thought that the negotiation reached a conclusion satisfactory to both parties (Tr. 121, 123).

Positions of the Parties

Appellant's post-hearing brief largely ignores the merits of the entitlement aspect of the claim. It dwells almost exclusively on the quantum, implicitly recognizing that its records fall far short of furnishing a basis for precise determination of additional costs attributable to government delays but arguing that the small size of the contractor makes its quantum methodology appropriate and that the result of such methodology furnishes the basis for a "jury verdict" by the Board, under the Changes clause, in the amount of $60,833.00.

Respondent argues that nine of eleven contract amendments should be treated as accords and satisfactions of the type of claim Appellant makes here; that the claim is barred by laches or, at least, Appellant must be held to a heavy burden of proof due to ten-year delay in presenting its claim which prejudiced Respondent, citing *L. Rosenman Corporation*, GSBCA No. 4828, 77-2 BCA ¶ 12,843; that Appellant has not sustained that burden; that Appellant has shown no basis for entitlement to interest on the claim; that Appellant's quantum claim is based on a "total time" approach which is inappropriate considering the isolated and non-sequential nature of the various delays involved; and finally that this is not a case for a "jury verdict" approach. Appellant having simply cast unsupported, unverifiable numbers before the Board in hope of obtaining some recovery out of the confusion.

Decision

Based on this less than satisfactory record, we deal first with Respondent's contention that eight of the ten amendments of Contract 2512 and the one amendment to Contract 2512 constitute accords and satisfactions of any claims Appellant may have had for costs of the delay type involved in this appeal. We need not consider amendments 3, 4, 6, 8, 9 and 10 to Contract 2513 because they cover limited types of direct costs such as transportation, hardware, and tolls which are not in dispute and, thus, not within the scope of this appeal.

The critical amendments are numbers 2, 5 and 7 to Contract 2513 and number 1 to Contract 2512. Amendment No. 2 dated March 2, 1967, covered the relocation of four 35PU's originally designated for installation in the Washington area. By its terms it covered only the direct costs due to change in destination of the four units. Also it antedated Zinger's March 8, 1967, letter in which Appellant first raised the matter of additional costs attributable to delays. Therefore, Amendment No. 2 cannot be considered an accord and satisfaction of delay-related costs.

The facts are different with respect to the other three critical amendments. Each of them was issued after Zinger had broached the subject of delay costs and, based on contemporaneous correspondence and other writings, we conclude that each was negotiated with such costs in mind. This conclusion is strongly supported by the wording of the amendments which clearly shows that they covered not only changes of destination of the units involved but also delays in scheduled delivery dates. We think it important, too, that Zinger, an experienced government contractor, mindful of its recently asserted requests for delay costs, did not, in signing these amendments, reserve or except a claim for such costs.

On this record we conclude that amendments 5 and 7 to Contract 2513 and

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amendment 1 to Contract 2512 were accords and satisfactions of delay costs related to the units involved therein.

This leaves open the question of delay costs related to amendment 2 to Contract 2513 which covered only direct costs related to changes in destination. We deny Appellant's claim as to the units involved in amendment 2 for failure to sustain its burden of proof. A long, unsatisfactorily explained delay in pursuing a claim imposes a heavier than usual burden on a claimant in proving its claim. *B-W Construction Co. v. United States* [2 CCF 60], 100 Ct. Cl. 227, 236 (1943). Unexplained delay in prosecuting a claim does not warrant the acceptance of vague assertions as evidence. *Maxan v. United States*, 126 Ct. Cl. 434 (1953). Appellant's evidence as to the alleged impacts of delay consists almost entirely of vague assertions and extracts from entries in books of account which cannot be verified because of Appellant's inexcusable destruction of records during the pendency of the appeal and as to which Mr. Zinger's own testimony did not attribute accuracy. Consequently, Appellant has not borne even the normal, let alone the heavier than usual, burden of proof imposed on it by its long delay in filing its claim.

The claim for recovery of the so-called "discount" of $2,100 must also be denied for the same reason. It is no more than a disguised request for an equitable adjustment for changes in location and delivery times of the SSPU's which the Appellant clearly failed to prove.

The appeal is denied.

APPEAL OF
ZINGER CONSTRUCTION COMPANY, INC.

Under Contract Nos. 6-1-02512 and 6-1-02513

P.S. BCA NO. 448

26 Federal Plaza
New York, New York

January 18, 1979
9:30 a.m.

Before:

HON. QUENTIN E. GRANT,

Board Member

Q [Mr. Joy] Have you ever heard the term used of a "Jury Verdict," in connection with equity [sic but equitable adjustments]?

MR. ANNA: Objection, calls for a legal conclusion. Mr. Schneiderman is not capable of answering that question.

THE COURT [sic]: I am going to sustain that objection.

MR. JOY: But, your honor –

THE COURT: You can make that argument to me.

MR. JOY: Your honor, excuse me, may I say this to you?

THE COURT: Sure.

MR. JOY: I have the greatest respect for Mr. Schneiderman, but I do have to develop this in a way if I may be allowed. But if the objection gets sustained, can I make an offer of proof?

THE COURT: Yes.

MR. JOY: The offer of proof would be this, that Mr. Schneiderman communicated with me as to the difference between our claim line and our cost incurred line and he said why shouldn't they be the same.

And I said, that it was because [of] the jury verdict and that we did not want to be in a position of making . . . [a] total cost claim, and that we were choosing not to . . . [seek] the . . . [full] dollars that would be available to us on this thing.

What I would like to examine him about would be this, if that response to him has affected him, you know, into a consideration of these fellows are using a system that I just can't use because they are using a jury verdict. I represent to you that the proof would be that he had hard the term jury verdict and it seemed to bring him to a dead end.

THE COURT: The jury verdict is what a Court uses when he can't get a handle on the cost, because the records are inadequate and that is the only time a jury verdict is used.

I don't why Mr. Schneiderman has to get into that, why that would have confused him.

He was asked to make an audit, as I understand, of Zinger corporation to see if they sustained the claim.

He says they didn't sustain the claim and he doesn't have to be concerned with a jury verdict.

I am the only one that can be concerned with that.

Board Hearing Tr. 149-51

Q [Mr. Joy]: . . . Do you feel that those records are unreliable as records of cash disbursements?

A There was no way of verifying the checks. There was no bank statement. Remember, this is based on a represented receipt and disbursement.

All you had was memorandum. All you had was entries there, I could go in at night and make all the entries you would like.

Q So that you would never allow a claim for compensation based on such records?

A I didn't say that.

Q Have you ever done it?

A Have I ever made an allowance. yes.

There was sufficient evidence or records or an added trail of some way to arrive at an amount.

Q Okay.

A Your tax return would substantiate pretty much if I was to accept—the last resort would be your tx return.

Q Do you consider that to be reliable for what it purports to be?

A The tax return?

Q Yes.

A If that was the last record I would say it would be reliable, and that is also included on Schedule 7.

Board Hearing Transcript 159-60

EXHIBIT A-1 "... AUDIT OF COSTS CLAIMED ..."

ZINGER CONSTRUCTION CO., INC.

CONTRACTOR'S OVER HEAD RATES

CALENDAR YEAR 1966 and 1967

EORM 1120-S U.S. SMALL BUSINESS INCOME TAX RETURN

	Calendar Year	
Overhead Pool	1966	1967
• • • •		
Direct Costs		
• • • •		
Wages on Site	$ 29,562	$28,245
• • • •		

Schedule 5

* * * *

ZINGER CONSTRUCTION CO., INC.
CONTRACTORS TAXABLE INCOME

FORM 1120-S U.S. SMALL BUSINESS CORPORATION
INCOME TAX RETURN

	Calendar Year (01/01 - 12/31)		
	1966	1967	Schedule
Net Sales	$209,729	$221,067 (*)	
Less			
Direct Costs	168,422	169,280	5
Overhead Expenses	33,077	49,305	5

* * * *

Schedule 7